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No. 89-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT OHIO POWER COMPANY

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STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Sup.Ct.R. 28.1, Respondent Ohio Power Company presents the following list of publicly-owned parent, subsidiary and affiliated companies:

American Electric Power Company, Inc.
Appalachian Power Company
Cardinal Operating Company
Columbus Southern Power Company
Indiana Michigan Power Company
Integrated Communications Systems, Inc.
Kentucky Power Company
Ohio Valley Electric Corporation

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BRIEF IN OPPOSITION OF RESPONDENT OHIO POWER COMPANY

STATEMENT OF THE CASE

Ohio Power Company (Ohio Power), as an affiliate of a registered utility holding company, is subject to regulation both by the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. §§ 79a *et seq.*, and by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA), 16 U.S.C. §§ 824 *et seq.* Recognizing that the existence of dual jurisdiction could lead to conflicting determinations, Congress mandated, in

section 318 of the FPA, 16 U.S.C. § 825q, that where a company is subject to a requirement under PUHCA, it shall not be subject to regulation under the FPA with respect to the same subject matter.

In 1972 Ohio Power, confronting a rapidly growing need for environmentally compatible coal, contracted with an affiliate, Southern Ohio Coal Company (Southern Ohio), to develop certain coal mines in order to assure a reliable supply of high-btu, low sulfur coal for particular generating facilities. The transaction was approved by the SEC which, in compliance with the mandate of section 13(b) of PUHCA, 15 U.S.C. § 79m(b), required that the sale be made "at cost."

This case results from the refusal of the FERC to permit Ohio Power to recover in its wholesale rates the costs which it is obliged to pay pursuant to the SEC's order, limiting recovery instead to a lower hypothetical market price. On appeal, a panel of the United States Court of Appeals for the District of Columbia Circuit unanimously vacated the decision of the FERC. Two members of the panel based their decision upon the primacy given to the SEC's determination by section 318 of the FPA. Judge Mikva, while disagreeing with the majority's reading of section 318, concurred in the result: he held that the FERC was required, by its own regulations, to presume conclusively that all coal costs subject to the SEC's regulatory jurisdiction were reasonably incurred.

This case does not present an issue worthy of further review. Section 318 simply has not been a source of dispute. Prior to the decision below, the most recent decision construing that Section was issued more than a quarter century ago and the result there is entirely in harmony with that of the court below. Nor does the decision below conflict with that of any other circuit as to the deference to be accorded an agency's construction of a jurisdictional statute.

1. Statutory Scheme

The Public Utility Act of 1935, 49 Stat. 803, 15 U.S.C. §§ 79a *et seq.*, was a comprehensive legislative response to a growing concern over the dominance of public utility holding companies and the possibility that by their charging excessive prices to their utility affiliates for goods and services, consumers would be required to bear excessive electric rates.[1] Section 13(b) made unlawful contracts between associates of a public utility holding company unless they are performed under such "terms and conditions" as the SEC "by rules and regulations or order shall prescribe . . . to insure that such contracts are performed economically and efficiently for the benefit of such associated companies *at cost* . . ." 15 U.S.C. § 79m(b) (emphasis added). Since the concern about affiliate transactions was with their impact on electric rates charged consumers of utility affiliates, and because a companion enactment would expand the rate regulatory jurisdiction of the FERC's predecessor, the Federal Power Commission (FPC),[2] Congess recognized that conflicts could develop. Congress chose not to accept that risk. Instead, it explicitly resolved the "supremacy" issue by providing, in section 318 of the FPA, that when a person is subject to a requirement of PUHCA it shall not be subject to regulation under the FPA with respect to the same subject matter.[3]

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[1] See Federal Trade Commission, *Summary Reports on Utility Corporations*, pt. 72-A, p. 467, pt. 73-A, pp. 63-64 (1935). The reports that formed the factual basis of the 1935 Act have been called "some of the most exhaustive and comprehensive studies ever to underlie a federal statute." *North American Co.* v. *SEC*, 327 U.S. 686, 701 n.11 (1946).

[2] 16 U.S.C. §§ 824 *et seq.*

[3] Section 318 of the FPA provides in pertinent part:

> If, with respect to the issue, sale, or guaranty of a security . . . . *or any other subject matter*, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a require-

2. The SEC's Review of Ohio Power's Coal Costs

Ohio Power is a wholly-owned subsidiary of the American Electric Power Company, Inc. (AEP), a regulated public utility holding company which provides electric service at wholesale and retail over a seven-state area through eight operating companies. In the early 1970's, AEP anticipated that low-sulfur coal, which would enable its generating plants to comply with new federal air emission standards, would become increasingly difficult and more costly to obtain. The urgency of these concerns was underscored by AEP's knowledge that it then had under construction or in the planning stage 15,500 megawatts of generating capacity, which would require an additional 32.5 million tons of coal annually. (Jt. App. filed in D.C. Cir., p. 85).

In 1971, the SEC authorized Ohio Power to create and to capitalize Southern Ohio, an affiliate, which would develop and operate coal mines. The SEC specifically provided that "[t]he charges for coal by Southern Ohio will be based on an amount *equal to the actual cost* of Southern Ohio in developing the reserve and mining such coal. . . ." *Ohio Power Co.*, Holding Company Act Release No. 17383 at 2 (Dec. 2, 1971) (emphasis added). Subsequently, in a series of additional orders, the SEC approved Ohio Power's sale of coal mines and leases to Southern Ohio, approved borrowings by Southern Ohio to reduce its cost of capital, approved further investments by Ohio Power in Southern Ohio to finance efficiency improvements in mining operations, and required both Ohio Power and Southern Ohio to file quarterly financial information and statements setting out "the quantities of

ment of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall aply to such person, and *such person shall not be subject to the requirement of this Act*, or of any rule, regulation, or order thereunder *with respect to the same subject matter*.

16 U.S.C. § 825q (emphasis added).

coal sold to each buyer, the price of such coal and the method used to compute the cost of coal sold." [4]

3. The Administrative Proceedings

In 1982, the FERC initiated a rate proceeding pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e. All issues were settled except the extent to which Ohio Power could include its costs for "captive coal" purchased from Southern Ohio in its recoverable cost of service.

As the Administrative Law Judge (ALJ) found, "[b]y 1978 the Martinka mine [operated by Southern Ohio] was in commercial operation and it was decided to use the Martinka coal at Mitchell [an Ohio Power generating unit that had previously experienced operational problems due to poor quality coal] and the results have been very favorable." *Ohio Power Co.*, 25 FERC Rep. (CCH) ¶ 63,060 at 65,182 (1983). The higher quality coal enabled the generating unit to increase its effective availability from 62 to 74 percent, which produced savings to customers of 24 to 36 million dollars. The Administrative Law Judge referred to this evidence as "unchallenged." *Id.* at 65,194. Further, the Judge found that Ohio Power was prudent in acquiring rights to Martinka coal, that the Martinka mine has been "efficiently operated," *id.* at 65,201, and that the inclusion of such coal costs in Ohio Power's wholesale rates for the three years in question (1980 to 1982) was reasonable. *Id.* at 65,202-03.

The FERC reversed. It rejected Ohio Power's contention that the agency was required, either under section 318 of the FPA or its own rules, to give conclusive effect to the cost-based method of pricing affiliate coal transac-

[4] *Ohio Power Co.*, Holding Company Act Release No. 20515, 14 SEC Docket 928, 930 (April 24, 1978). *See also Southern Ohio Coal Co.*, Holding Company Act Release No. 21008, 17 SEC Docket 310 (April 17, 1979); *Southern Ohio Coal Co.*, Holding Company Act Release No. 21537, 19 SEC Docket 1309 (April 25, 1980).

tions mandated by the SEC. Instead, without questioning the finding that the mine had been efficiently operated, without even mentioning the benefits of assuring a long-term supply of high quality coal or the resulting savings realized by consumers, and dismissing as "fortuitous" the environmental benefits provided by the low-sulfur coal, the FERC directed Ohio Power to refund the difference between the cost-based price paid to Southern Ohio and a calculated hypothetical market price.

4. The Decision Below

The court below unanimously vacated the decision of the FERC. *Ohio Power Co.* v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989) (Pet. App., pp. 1a-28a). A majority of the panel rested its decision on statutory grounds. Noting that the FERC itself did not claim that its interpretation of section 318 was entitled to deference under this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny, the majority found that such deference would not, in any event, be appropriate since section 318, unlike the statute at issue in *Chevron*, was not one entrusted to the FERC's administration. In apportioning jurisdiction between two federal agencies, that statute gave jurisdictional primacy to the SEC.

The court next rejected the FERC's rationale for concluding that section 318 is inapplicable: that the same "subject matter" was not implicated by the actions of the two agencies and, in any event, that the preclusive effect of section 318 was dependent on the existence of an actual conflict. Recognizing that the FERC has, in effect, set a different price term than had been set by the SEC for the cost of affiliate coal, the court found "[t]he conclusion that the same subject matter is implicated is inescapable." 880 F.2d at 1406 (Pet. App., pp. 9a-10a). Under the FERC's reasoning, the court observed, "there could never be a conflict between the SEC and FERC with respect to a matter not specifically enumerated in section 318" and it

was not inclined to render "the residuary language of section 318 meaningless." *Id.* (Pet. App., p. 10a). Further, the court noted that the objective of SEC regulation was not as limited as the FERC had surmised but, rather, included the charge that the SEC "exercise its power in the interest of consumers, as well as of investors and the public, and 'to insure that such contracts are performed *economically and efficiently*,' as well as 'at cost.' 15 U.S.C. § 79m(b) (emphasis added)." *Id.*

As to the necessity for actual conflict, the court concluded that it is sufficient, under section 318, that a person is subject to a requirement under PUHCA. *Id.* at 1408 (Pet. App., p. 14a). The court further found that the application of different standards by the FERC and the SEC to the same transaction in fact created a conflict, leading to the "trapping" of costs. *Id.* at 1410 (Pet. App., p. 18a). Cognizant of this Court's precedents that disfavor conflicting regulations resulting in trapped costs, *see, e.g., Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), the majority found that the market-based test adopted by the FERC would impermissibly create trapped costs when applied to transactions regulated by the SEC under an "at cost" standard.

Judge Mikva disagreed on the issue of statutory construction but agreed in a separate concurrence that the FERC's decision must be vacated for under the FERC's own regulation, 18 C.F.R. § 35.14(a)(7), there is a conclusive presumption that the costs of fuel purchased from an affiliated company which are subject to the jurisdiction of another agency are reasonable, and the FERC must abide by that agency's determination in its ratemaking decisions. The majority had no occasion to reach that issue.

REASONS FOR DENYING THE WRIT

I. Conflicts Between the SEC and the FERC Triggering Section 318 Occur Extremely Rarely

The decision of the court below will have no significant impact either upon the development of federal law or upon the FERC's administration of its ratemaking authority under the Federal Power Act. In the more than fifty years during which the SEC and the FERC have exercised their respective responsibilities under PUHCA and the FPA, only a handful of occasions have arisen presenting the potential for a conflict, and there is no reported case in the last quarter century in which either the FERC (or its predecessor) or the federal courts have even had occasion to construe the reach of section 318.[5] There is simply no reason for this Court to review the construction placed on a rarely-invoked federal statute, particularly when, as we show below, any other construction would have frustrated Congressional intent and made meaningless the regulations and orders issued by the SEC.

II. The Court Below Correctly Construed Section 318

The decision of the court below is eminently correct. The plain meaning of section 13(b) of PUHCA and section 318 of the FPA could hardly be more clear: utility purchases from affiliates are to be at cost, subject to the oversight of the SEC, and the FERC is precluded from exercising jurisdiction over the "subject matter" of those transactions. Congress entrusted the regulation of affiliate transactions to the SEC precisely to shield customers of holding company utility subsidiaries from excessive rates; specified the principle that those transactions be performed "at cost"; and having recognized the potential

[5] The SEC decisions cited by *amicus* Indiana Municipal Power Authority (Br., pp. 8-9) do not involve the construction of Section 318.

for conflict between the SEC and the FPC, resolved that issue directly and decisively in favor of the SEC.

1. Petitioners' claim that the majority's interpretation of section 318 creates a substantial "regulatory gap" is simply wrong. There is no gap, substantial or otherwise, because the SEC exercises plenary review over transactions between affiliates of a public utility holding company. As it did in this case, the SEC typically issues detailed orders specifying the components which may be included in the cost calculations. *See supra*, pp. 4-5 and n.4. Petitioners and the FERC may disagree with Congress' approach in PUHCA or with the SEC's application of that approach, but neither the FERC nor the courts are free to repudiate the clear direction of Congress.

This case does raise any issue concerning which federal agency has the authority to investigate whether a company providing goods or services to an affiliated utility within a holding company has been efficiently operated, so as to minimize the costs to be reflected in rates. The FERC's ALJ reviewed Southern Ohio's costs and concluded that the Martinka mine was "efficiently operated." 25 FERC Rep. (CCH) at 65,201. The FERC did not disturb this finding, but, rather, substituted an entirely different substantive standard for that employed by the SEC and mandated by Congress. The issue in this case is not the creation of a "regulatory gap"; the SEC regulates transactions between affiliates in holding companies. The issue is the FERC's attempted regulatory nullification of a substantive standard adopted by a sister federal agency, acting pursuant to clear statutory direction. The court below correctly rebuffed the FERC's attempt.

2. Petitioner's other major assertion is that the term "subject matter" in section 318 should be narrowly interpreted so that "the coal price charged to Ohio Power

by its affiliate is one 'subject matter,' and the coal-related fuel charge passed through to Ohio Power's customers is a separate 'subject matter.' " Cert. Pet., p. 13. The court below rejected this contention, and with good reason.

The SEC *never* regulates rates for the sale of electricity, a fact surely known to the Congress that entrusted that responsibility to the FERC. As the court below correctly found, the FERC's construction would render Section 13(b) of PUHCA pointless. Nothing of substance would be left of that section's "at cost" mandate if the public utility must base its charges to its customers as though the prices paid to its affiliate were determined on some other basis. Congress considered, but ultimately rejected, placing jurisdiction over transactions between holding company affiliates in the FPC.[6] Had Congress left jurisdiction with the FPC, could Petitioners seriously maintain that the FERC would be free to ignore its own decisions under PUHCA when setting rates under the FPA? Surely not. They are on no firmer ground in claiming that the FERC may disregard the determinations of the SEC.

3. As the majority below correctly recognized, its decision is butressed by this Court's recent precedents that disfavor conflicting regulation resulting in trapped costs. In *Nantahala Power & Light*, 476 U.S. at 970-71, the Court held that it was impermissible for a state utility commission setting retail rates to "trap" costs by making a different allocation between related companies of a fixed quantity of low-cost power than had the FERC at the wholesale level. A similar concern as to trapped costs led this Court to conclude in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 407 U.S. 354 (1988), that a state utility commission, when exercising its jurisdiction

[6] H.R. 5423, 74th Cong., 1st Sess. §§ 12(a)-12(d) (1935); S.1725, 74th Cong., 1st Sess. § 13(g) (1935). *See* H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7 (1935).

over retail rates, cannot inquire into the prudence of expenditures incurred during the construction of a nuclear plant from which a utility purchased power for resale when the FERC, in establishing wholesale rates, had allocated the cost of that plant among affiliated companies.

Petitioners erroneously assert that *Nantahala*'s "underlying principle" is "deference to FERC in ratemaking matters." Cert. Pet., p. 15 n.7. Rather, *Nantahala* and its progeny stand for the principle of deference to the agency with primacy over the cost determination. In *Nantahala* and *Mississippi Power & Light* the agency with primacy was the FERC; in this case, it is the SEC. Just as "a state's 'undoubted jurisdiction over retail rates' does not empower it to redetermine issues underlying FERC-set wholesale rates," 880 F.2d at 1406 (Pet. App., p. 10a), *quoting Nantahala*, 476 U.S. at 970, the FERC's undoubted jurisdiction over wholesale rates does not empower it to redetermine issues subject to the SEC's regulations and orders, issued under PUHCA. The District of Columbia Circuit faithfully adhered to the principles of *Nantahala* and *Mississippi Power & Light* in requiring that the FERC give effect to the SEC-imposed cost standard.

The panel's decision does not oust the FERC of jurisdiction over how costs are to be recovered in rates. So long as the FERC does not "trap" costs that the regulations or orders of the SEC says shall be recovered,[7] the FERC is free to exercise its plenary authority, just as state public utility commissions are free to exercise their plenary authority over retail rates, so long as they do not "trap" costs that the FERC says shall be recovered.[8]

[7] *Cf. California Oregon Power Co. v. FPC*, 150 F.2d 25 (9th Cir. 1945), *cert. denied*, 326 U.S. 781 (1946) (denying recovery of charges for affiliate transactions in excess of costs).

[8] Although the SEC has, in a variety of contexts, recognized that it does not have jurisdiction over the rates charged by utility subsidiaries of holding companies, *e.g.*, *Arkansas Power & Light Co.*,

4. The court below correctly rejected the contention that an actual conflict between the requirements imposed by the SEC and by the FERC is necessary for section 318's mandate of deference to the SEC to be invoked. 880 F.2d at 1408 (Pet. App., p. 14a). That conclusion is fully consistent with the decision of the Fourth Circuit in *Appalachian Power Co.* v. *FPC*, 328 F.2d 237 (4th Cir.), *cert. denied*, 379 U.S. 829 (1964), although Petitoners contend otherwise. There, the court upheld an FPC order requiring a utility subsidiary of a holding company to maintain certain accounts on its corporate books. The court held that section 318 did not apply because "the SEC . . . does not require utilities to keep their books in accordance with its requirements." Indeed, the SEC by rule "explicitly excepted" the transaction from its accounting requirements and "specifically authorize[d] [adherence to] the FPC's uniform system of accounts." *Id.* at

Holding Company Act Release No. 18,750, 5 SEC Docket 24, 25 (1974); *New England Power Service Co.*, 10 S.E.C. 562 (1941), it has never indicated approval of the FERC's application of a different standard to transactions subject to the SEC's jurisdiction under PUHCA. To the contrary, the SEC staff has indicated that it is the FERC's role to apply an SEC order "to a particular rate case." Comments of the Division of Corporate Regulation of the SEC on the FERC Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978, at 3 (Oct. 27, 1978). Further, the Chairman of the SEC informed Congress in 1982 that, as a result of section 318 and of the FERC's 1981 decision adopting a market-based test for non-PUHCA regulated transactions, *Public Service Co. of New Mexico*, 17 FERC Rep. (CCH) ¶ 61,123 (1981), *aff'd*, 832 F.2d 1201 (10th Cir. 1987), "that portion of the industry represented by the registered holding company systems is now subject to a different federal standard for determining affiliate transaction prices than that applied to the rest of the industry." *The Public Utility Holding Company Act of 1935: Hearings on H.R. 5220, H.R. 5465 and H.R. 6134 Before the Subcomm. on Energy Conservation and Power of the Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 583 (June 9, 1982) ("1982 PUHCA Hearings"). This statement would be true only if the at-cost standard of section 13(b), as applied by the SEC, were reflected in wholesale rates.

250. Although the court used the phrase "actual conflicts," it is clear that the utility was not "subject to . . . a requirement of [PUHCA] or a rule, regulation or order thereunder" with respect to the subject matter of the FERC order and section 318 was therefore inapplicable.[9] Here, in contrast, the SEC's orders and its generally applicable regulations specify a standard to be applied to transactions between affiliates within holding companies.[10] Ohio Power is undeniably subject to a requirement under PUHCA with respect to its purchases of coal from Southern Ohio making section 318 applicable by its unambiguous terms.

Further, although the court below did not rest its decision on this ground, it also found that the application of an at-cost standard by the SEC and a comparable market standard by the FERC to the same transaction in fact

[9] *Accord Northwestern Electric Co.* v. *FPC*, 321 U.S. 119 (1944) (upholding FPC accounting order where Solicitor General informed the Court that Section 318 would not apply "[u]ntil the SEC does by rule or order impose 'requirements'" applicable to the situation at bar, Resp. Br., App. D. at 89-99). In *Appalachian Power*, the court observed:

> In sum, the effort to discover an incompatibility between the two governmental agencies must fail. The SEC does not in this litigation nor has it in any analogous context intimated such a conflict with the FPC. It has, in fact, repeatedly expressed a diametrically opposite view.

328 F.2d at 252. Here, to the contrary, the Chairman of the SEC has certainly "intimated such a conflict" (*see* 1982 PUHCA Hearings, *supra* n.8) and the regulations of the SEC render impossible any other judgment (*see infra*, n.10).

[10] The SEC's regulations, in 17 C.F.R. § 250.90, prohibit transactions between holding company affiliates "at more than cost," determined in accordance with 17 C.F.R. § 250.91, except as permitted by SEC order or regulation. 17 C.F.R. § 250.92 provides that a market test will be applicable to a sale of goods produced by a subsidiary of a holding company to an affiliate. Under the SEC's regulations, a market test, where applicable, is plainly an alternative to the at-cost test, rather than a supplement to it, as suggested by the FERC (Br. for Fed. Resp., p. 3).

created a conflict, leading to a trapping of costs. 880 F.2d at 1410 (Pet. App. p. 18a). The FERC asserted that its order permitted Ohio Power to recover a fair market value for coal purchased from Southern Ohio even if the market price exceeded the cost-based price paid to Southern Ohio, but the FERC "does not, and apparently cannot, explain how OPCO can recover in its rates such a fair market value in excess of cost without running afoul of the SEC's bar in 17 C.F.R. § 250.90(a)(2)." *Id.*

III. Petitioners' Complaints About the Statutory Scheme Should Be Addressed to the Legislative, Not the Judicial, Branch

Petitioners present a parade of horribles that they claim will result from the decision below: potential self-dealing between affiliated companies, rate manipulation, and the "unnecessary 'gold plating' of plant and equipment." Cert. Pet., p. 18. Such hyperbole provides scant reason for this Court to grant review. To begin with, more than fifty years of experience under PUHCA show such claims to be entirely unfounded. Moreover, to the extent that Petitioners are unhappy with the decision by Congress to give primacy to the SEC over inter-affiliate transactions, their remedy lies with the legislative branch, and not with the courts.

The short answer to Petitioners' parade of horribles is that one would expect, if Petitioners were correct, to have seen some evidence of these claimed abuses in the last fifty years. There is none. Pursuant to its mandate under PUHCA, the SEC must scrutinize the prices charged between affiliates of registered holding companies. As the court below correctly recognized, 880 F.2d at 1406 (Pet. App.. p. 10a), the SEC has statutory responsibility under PUHCA to exercise its power in the interests of consumers, as well as of investors, and "to insure that such contracts are performed *economically and efficiently*"

as well as "at cost." 15 U.S.C. § 79m(b) (emphasis added). If Petitioners are unhappy with the way that the SEC has been discharging its jurisdiction, they are free to challenge that exercise of regulatory authority directly. But dissatisfaction with the SEC's regulatory judgment does not provide a basis for the disregard of that judgment by the FERC.

In point of fact, the record below demonstrates that Southern Ohio operated the Martinka mine efficiently and that the affiliate transactions approved by the SEC resulted in substantial savings to rate payers. The use of high quality coal by Ohio Power, which it obtained from its investment in its affiliate's mining operations, increased the availability of the generating unit using the coal from 62 to 74 percent. As a result, taxpayers saved between 24 and 36 million dollars, according to the undisputed evidence. 25 FERC Rep. (CCH) at 65,194.

More fundamentally, Petitioners' claims are addressed to the wrong forum. Petitioners would prefer that the market-based test, which the FERC first adopted in its 1981 *Public Service Co. of New Mexico* decision for non-PUHCA regulated transactions, apply as well to transactions between affiliates of public utility holding companies. If such changes are desirable, then it is for the legislative branch to make them. Judicial intervention is particularly inappropriate as Congress has considered repealing or amending PUHCA (which would remove SEC jurisdiction over the transactions at issue here), and has declined to do so.[11] Indeed, in 1982, when Congress was specifically informed by the Chairman of the SEC that different standards were being applied by the SEC and the FERC for determining affiliate transaction prices (as a result of the FERC's 1981 decision in *Public Service Co. of New Mexico* and the SEC's enforcement of section 13(b) of PUHCA),[12] Congress chose not to modify the

[11] *See* 1982 PUHCA Hearngs, *supra* n.8.

[12] *Id.* at 582-83.

statutory scheme that has worked so well for the past fifty years. There is no reason for this Court to do so.

IV. The Application of the *Chevron* Deference Principle Is Not in Conflict With Decisions by Any Other Circuit

Petitioners contend that further review is required to resolve a conflict among the Circuits over the extent to which the principle of deference to an agency's construction of a statute that it administers, *see Chevron, USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), applies to jurisdictional statutes. This case does not present an appropriate vehicle to resolve any such conflict. As the Court held in *Chevron*, where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. As discussed, *supra* at pp. 8-9, that is precisely the circumstance here.

Second, the FERC itself did not contend in the court below that its construction of section 318 was entitled to deference. 880 F.2d at 1405 (Pet. App., p. 8a).

Third, the statutory issue aside, the decision of the court below can be affirmed on the alternative ground relied upon by Judge Mikva, namely, that FERC's own regulations require it to give conclusive effect in rate-making proceedings to the inter-affiliate fuel price determination made by the SEC.

Equally important, the decision below does not conflict with that of any other court of appeals over the application of the deference principle articulated in *Chevron*. The decisions of the First and Ninth Circuits cited by Petitioners involve the construction of a statutory provision which regulates the jurisdictional reach of a single federal agency. In each, the Circuit Court applied the *Chevron* deference principle in sustaining the agency's

construction. *See Kokajko* v. *FERC*, 873 F.2d 419 (1st Cir. 1989) (involving the FERC's construction of the scope of its jurisdiction under the FPA over hydroelectric power plants); *Wyckoff Co.* v. *EPA*, 796 F.2d 1197 (9th Cir. 1986) (involving the EPA's construction of its jurisdiction under the Resource Conservation and Recovery Act). Likewise, in *Puerto Rico Maritime Shipping Authority* v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988), the Third Circuit deferred to the Interstate Commerce Commission's construction of a jurisdictional statute governing the authority of that agency to regulate certain interstate shipments.

Whether these decisions correctly applied the *Chevron* deference principle to an agency's construction of its own jurisdictional statutes is essentially beside the point, for the statute at issue here is fundamentally different: it apportions jurisdiction between two agencies each of which is entrusted with responsibility to administer portions of a comprehensive, integrated statutory scheme.[13]

The decision of the court below not to give any special deference to the FERC's reading of section 318 also makes eminent sense. Any construction of that section by the FERC which broadened its authority would necessarily constrict the jurisdiction of the SEC, the agency given primacy by Congress. Congress recognized in section 318 that the regulatory structure must speak with one voice to avoid imposing conflicting requirements on regulated entities and it unequivocally gave that voice to the SEC, not to the FERC. In this circumstance, there is no reason for a court to defer to a construction placed on that section by the subordinate agency, which surely has no greater expertise as to the meaning of this conflict avoidance provision.

[13] *Puerto Rico Maritime Shipping Authority* did implicate the jurisdiction of the Federal Maritime Commission as well as that of the Interstate Commerce Commission, but it did not present a circumstance of shared responsibility.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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